APPEAL NO. 020744
FILED MAY 7, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on February 21, 2002. With regard to the five issues before her, the hearing officer determined (1) that the respondent (claimant) sustained a repetitive trauma injury in the course and scope of employment; (2) that the claimant had disability from January 9 through January 29, 2001; (3) that the date of injury pursuant to Section 408.007 was _____; (4) that the claimant had good cause for failing to give timely notice to the employer; and (5) that the claimant timely filed his claim for compensation. The determinations on date of injury and timely filing of the claim have not been appealed and have become final. Section 410.169.

The appellant (carrier) appeals the injury, disability, and notice determinations on a sufficiency of the evidence basis. The claimant responds, pointing to evidence which supports the hearing officer's decision.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant had been employed as a lineman/crew chief for the employer electric cooperative for 24 years. The claimant testified in detail about the tools that he used and the type of work that he performed. The carrier contends that the claimant's work activities were not repetitiously physically traumatic but rather were "a wide variety of activities . . . that . . . varied from day to day." Whether the activities were or were not repetitious and physically traumatic was a fact question for the hearing officer to resolve. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). She did so in the claimant's favor and that determination is supported by the evidence.

The claimant had right elbow surgery on January 9, 2001, and then returned to work on January 30, 2001. The hearing officer's determination that, due to the repetitive trauma injury, the claimant was unable to obtain and retain employment at his preinjury wage from January 9 through January 29, 2001, is supported by the evidence. The carrier's appeal on the disability issue is premised on no compensable injury.

Section 409.001(a) provides that an employee or a person acting on the employee's behalf shall notify the employer of an injury not later than the 30th day after the date on which the injury occurs, or, in the case of an occupational disease, the date the employee knew or should have known the injury may be related to the employment. Section 409.002 provides that failure to notify an employer as required by Section 409.001(a) relieves the employer and the employer's insurance carrier of liability unless the employer or the employer's insurance carrier has actual knowledge of the employee's injury, the Texas

Workers' Compensation Commission determines that good cause exists for failure to provide notice in a timely manner, or the employer or the employer's insurance carrier does not contest the claim. Travelers Insurance Company v. Miller, 390 S.W.2d 284 (Tex. Civ. App.-El Paso 1965, no writ). A claimant that fails to give timely notice of injury has the burden to show good cause for such failure. Aetna Casualty & Surety Company v. Brown, 463 S.W.2d 473 (Tex. Civ. App.-Fort Worth 1971, writ ref'd n.r.e.).

The claimant testified that he began to experience decreased range of motion in his right elbow in 1996, that he began to have pain in his elbow in 1997 after it was bumped by a cow, that the claimant was referred to Dr. S by his family doctor in 1998 for treatment of left elbow complaints, and that the claimant had right elbow surgery in September 1998. The claimant then had left elbow surgery in December 1998. The claimant testified that the doctors told him that his problems were due to arthritis and bone spurs. The claimant continued working and he testified that in October/early November 2000, he had additional problems with his elbows and returned to Dr. S for treatment. At an office visit on _____, Dr. S wrote a "To Whom it May Concern" letter dated that same date, and gave it to the claimant, apparently to give to his employer. The letter stated in part:

> the right [elbow] continues to give him more discomfort. It seems to be aggravated more by work related activities such as tightening bolts, lifting and carrying, and I feel that because of the progressive nature of his problems with both elbows which is aggravated by work related activity, he may be best benefited to be in a less manually stressful job such as warehouse or driving type activities. If those are not available consideration for early retirement would be an option for him as well. I do not feel he will be able to continue at his current level of physical requirement work for a lengthy period of time and so would consider doing these work modifications or medical retirement in a timely fashion, if possible.

In an unappealed finding, the hearing officer determined that _____, was the date the claimant knew or should have known that the problems with his elbows might have been caused by his work (the date of injury as defined in Section 408.007). Consequently pursuant to Section 409.001(a) the claimant had until _____, to notify his employer of his injury.

The claimant testified that he did not give Dr. S's letter to his employer (at that time) because he wanted to continue working for another five years so that he could get his full retirement. Based on the claimant's testimony, the hearing officer made the following appealed findings:

FINDINGS OF FACT

12. On _____, it was reasonable for Claimant to want to continue doing his regular job until 2005 when he would be eligible for retirement with full benefits.

13. On _____, it was reasonable for Claimant to believe that he could continue completing any assignment given to him as Crew Chief by Employer; Claimant based his belief on his past work experience.

In appealing those findings, the carrier heavily relies on Texas Workers' Compensation Commission Appeal No. 960238, decided March 21, 1996, which the carrier asserts establishes the proposition that "a desire to continue working, in and of itself, does not constitute good cause for failure to timely notify the employer of an alleged work-place injury." What that complete phrase in Appeal No. 960238 actually says is:

> While we agree . . . that being able to continue to work would not, in and of itself, necessarily constitute good cause and that the claimant did not directly testify that he thought his injury was trivial, there is some evidence in the record to support a reasonable inference that the claimant did not appreciate the seriousness of his injury . . . .

We have frequently noted that the test for the existence of good cause is that of ordinary prudence, that is whether the claimant prosecuted his or her claim with that degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances. Hawkins v. Safety Casualty Co., 146 Tex. 381, 207 S.W.2d 370 (1948). Good cause for delay from the viewpoint of ordinary prudence is ordinarily a question of fact. Aetna Casualty & Surety Company v. Brown, *supra*. As in Appeal No. 960238, there is some evidence in the record to support the reasonable inference that on _____, the claimant could reasonably believe that he could continue working in his job as a crew chief, at least for the time being. We can affirm the hearing officer's findings that the claimant had good cause for not reporting his injury on _____.

Dr. S saw the claimant again for a follow-up visit on December 8, 2000. Dr. S's note of that date indicates increasing pain, "some regrowth of [claimant's] bone spurring" and Dr. S recommended additional surgery which was "scheduled for 1-9-01." The hearing officer only noted (and found) that the claimant "learned he needed another surgery on his right elbow; surgery was scheduled for January 9, 2001." It is relatively undisputed that the claimant (actually the claimant's wife) did not give notice to the employer of his injury until January 11, 2001, two days after his surgery. While an ordinarily prudent person may have believed he could continue working, even with Dr. S's _____, letter, it is not reasonable that the claimant, on _____, knowing he had surgery scheduled for January 9, 2001, would continue to withhold Dr. S's letter from the employer and presumably have the carrier liable for surgery performed before the claimant gave notice. The Appeals Panel has frequently noted that good cause must continue up to the time that notice was actually given or within a reasonable time after the good cause ends. Hawkins, *supra*. Texas Workers' Compensation Commission Appeal No. 002573, decided December 14, 2000. As previously noted the claimant had 30 days from _____, or until _____, to timely report his injury and he had good cause for not reporting the injury from _____, until about _____, when his doctor told him that he needed surgery and, in fact, scheduled surgery. We hold that the hearing officer's

inferred finding of good cause for failing to timely report his injury after _____ or _____, to be unsupported by the evidence and against the great weight and preponderance of the evidence. We reverse the hearing officer's determination that the claimant had good cause for not timely notifying his employer of his repetitive trauma injury after _____, and render a new decision that the carrier is relieved from liability because the claimant failed to timely notify his employer of the injury and that there was no good cause for the failure to provide such timely notice after _____, and that the claimant failed to report his injury within 30 days of _____, or _____.

We affirm the hearing officer's determinations that the claimant sustained a repetitive trauma injury and that the claimant was unable to obtain and retain employment at the preinjury wage from January 9 through January 29, 2001. We reverse the hearing officer's determinations that the carrier is not relieved from liability because the claimant had good cause for failing to give timely notice and render a new decision that the carrier is relieved of liability for the claimant's failure to give timely notice of his injury to his employer pursuant to Section 409.001 and that the claimant did not have good cause for failing to give timely notice after _____, pursuant to Section 409.002(2). Because the carrier is relieved of liability, the claimant cannot, by definition in Section 401.011(16) have disability and we render a new decision that the claimant does not have disability.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

MR. RUSSELL R. OLIVER, PRESIDENT
221 WEST 6TH STREET
AUSTIN, TEXAS 78701.

Thomas A. Knapp
Appeals Judge

CONCUR:

Michael B. McShane
Appeals Judge

Robert W. Potts
Appeals Judge